Spare the rod?

New laws, old visions

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Not 'back to the future' but 'forward to the past' for juvenile justice in Queensland.

On 4 August 1992, the Queensland Parliament passed the *Juvenile Justice Act* 1992 and the *Children's Court Act* 1992. The legislation, which it is anticipated will be proclaimed in early 1993, repeals the juvenile justice provisions of the *Children's Services Act* 1965. It provides the legislative framework for the administration of juvenile justice in Queensland, and thus the ethos of this legislation will inform practice and policy in Queensland into the 21st century. The intention of this article is, first, to critically consider the adequacy and vision of the legislation, second, to question the extent to which it appropriately responds to the causes and consequences of juvenile crime and, third, to examine the potential it offers for increased confidence in the juvenile justice system by young people and the community.

The Juvenile Justice Act

The *Juvenile Justice Act* was long promised in Queensland. In introducing the legislation to Parliament, the Minister for Family Services and Aboriginal and Islander Affairs (Hon. A. Warner) stated that the *Children's Services Act* was 'outdated and inadequate':

> The Provisions of that Act reflect the ethos prevalent during the mid-sixties that children should be dealt with primarily on the basis of their welfare needs. Less emphasis is placed on the nature and extent of offences which have been committed.
>
> This is out of step with current thinking that children should be held accountable for their actions.

Juvenile justice practice in Queensland has not reflected 'welfare model' principles for at least a decade.[1] Regardless of this, the Queensland Government followed the path well trodden by other States and overseas jurisdictions and introduced a 'justice model'.

The legislation provides the framework for responding to juveniles who have offended, or are alleged to have offended, against the criminal law. It, thus, should be analysed in terms of:

- the understanding of crime implicit in the legislation;
- the responses to criminal misbehaviour explicit in the legislation;
- the extent to which it encourages the respect for the rights of young people suspected of offending behaviour;
- the extent to which it encourages a respect and a response to victims;
- the extent to which it responds to the overrepresentation of Aboriginal and Torres Strait Islander children.

In explicitly reflecting 'justice model' principles, the legislation assumes that the child is primarily responsible for his or her behaviour, and consequently the task of the court is to adjudicate guilt or innocence and, having established guilt, the court's response should be proportionate to the child's deeds and culpability.[2] The justice model is underpinned by a neo-classical model of crime causation which posits that appropriate and certain punishment has both individual and general deterrent effects.[3]

The *Juvenile Justice Act* establishes as a principle of juvenile justice (s.4(e)) that:

> a child who commits an offence should be
>
> (a) held accountable and encouraged to accept responsibility for the offending behaviour; and

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> (b) punished in a way that will give the child the opportunity to develop in a responsible, beneficial and socially acceptable way

and the sentencing principles (s.109(1)) require among other matters 'a fitting proportion between sentence and offence.'

The legislation provides statutory backing for the Queensland Police Service's Cautioning program, and therefore envisages a substantial number of children will continue to be diverted from the court.[4] Cautioning is, however, perceived in terms of its deterrent effects. The Minister stated: 'This [cautioning] is usually a sufficient deterrent to further offending'.

The language of punishment and deterrence was, and is, a recurring motif in the Government and Department's discussion of the legislation. For example, in a document prepared by the Department of Family Services and Aboriginal and Islander Affairs (DFSAIA) to explain the legislation to students and other interested people, the second paragraph states:

> These Acts will ensure that young people will receive fair and fitting penalties for breaking the law. Juvenile crime is a serious problem and its victims are entitled to expect that offenders will be punished.[5]

The sentencing options in the legislation reflect this philosophy.

The view that children are individually responsible for their behaviour, and may be deterred from offending by appropriate punishment is questionable. Recent research indicates that non-offending and desistance from offending is best accounted for by the normative and ethical orientation of the individual, rather than the perception of the certainty, celerity and severity of punishment.[6] Similarly, the structural factors associated with juvenile crime have been noted elsewhere, not least by the Queensland Government which introduced a social-problems-oriented primary crime prevention program (discussed below).

Pre court

Leaving to one side the criticisms of the justice model, it is appropriate to examine the legislation in its own terms; that is the extent to which it gives effect to underpinning assumptions of the justice model. The justice model emerged as a response to the documented failure and injustices of the welfare model.[7] The criticisms focused on the child's lack of due process rights, the potential intervention for non-criminal matters, the failure of the rehabilitative ideal, and the excess of discretionary power exercised by child welfare bureaucracies. Many reformers were concerned about the harm suffered by children at the hands of bureaucracies acting in children's 'best interest'. The benefits claimed for the justice model are that children are accorded the same legal safeguards and due process rights accorded to adults, intervention is restricted to criminal matters, and sentencing is proportionate to the child's deeds, rather than needs. Coercive intervention on welfare grounds is theoretically restricted.[8] Put simply, the model proposes that children should not only be subject to the law but benefit from the protection of the law. The *Juvenile Justice Act* and *Children's Court Act* provides many mechanisms to hold children accountable, but few mechanisms by which others may be held accountable for their action towards children.

Children's vulnerability during the investigation of criminal offences has been well documented.[9] The *Juvenile Justice Act* holds as a matter of general principle (s.4(a)):

> because a child tends to be vulnerable in dealing with persons in authority a child should be given the special protection allowed by this Act, during an investigation, or proceeding in relation to an offence committed, or allegedly committed by a child.

Yet the special protections provided in this Act in relation to the investigation of an offence are few and far between. There is no requirement in the Act that children are to be informed of their legal rights, nor is there a clear statement of those rights in the legislation. There is no right to a telephone call, no right of legal advice before, or during questioning, no real restriction on the right of arrest (though police may initiate proceedings in other ways), no restrictions on fingerprinting or photographing children and so on. While there is a rebuttable requirement that a child should be questioned in the presence of an independent adult, there is no statement of the purpose of the attendance of an adult at an interview, no clear statement as to when the adult should be present from, no requirement of the police to inform the independent adult of their role in the interview and to inform this person of the child's rights. There is no right of access to legal advice, let alone any positive obligation on the state to guarantee the availability of legal assistance.

It is not that the legislation does not allow children to be dealt with informally, for proceedings to be initiated by way of attendance notices, rather than arrest and so on; the problem with the legislation is that it fails to limit the discretion of the police, or formally require them to inform the child of their rights and so on. Thus it ignores the substantial documentation of current problems in the investigatory phase.[10]

Court and sentencing

The *Juvenile Justice Act* provides the code for dealing with children charged with offences. The *Children's Court Act* provides for a judge as president of the jurisdiction. The Children's Court judge will hear serious matters, and exercise a review function in relation to sentence.

The Act provides the expected due process of rights of the child in relation to pleas of not guilty. The *Children's Services Act*, though nominally a welfare model, similarly granted full due process rights to the child.[11] The *Children's Services Act* provided more stringent safeguards in that it required the finding of a *prima facie* case in all matters involving indictable offences, prior to any plea. The *Juvenile Justice Act* does not provide an absolute right of legal representation: representation depends on the means of the child and the availability of legal aid services.

The major claim made for the legislation is that it embodies a 'new' approach to sentencing and new and expanded sentencing options.

Though the justice model theoretically places the trial at the centre of the court process, wherein any injustices may be remedied, the reality is that trials are a rarity; the real business of Children's Courts and other summary courts is that of sentencing offenders.[12] The sentencing principles and sentencing options are therefore central to the Act and, of course, of central symbolic importance.[13]

The sentencing principles are set out in s.109 of the Act and in the 'general principles' in s.4 of the Act. On the positive side, these principles call attention to age as a mitigating factor and to the fact that detention is an option of last resort. On the negative side is the Act's dominant vision that the appropriate response to juvenile crime is punishment. Age, immaturity, employment and so on are merely factors which serve to mitigate the penalty.

The central organising theme of punishment is expressed through the sentencing options in the legislation for it is the sentencing options that enable the courts to give effect to the sentencing principles. The sentencing options provided, constitute an escalating hierarchy of punishments. The options are detailed in *Table 1* together with the options available under the *Children's Services Act* as a major claim for the new legislation is that it provides an extensive new range of sentences.

TABLE 1

Sentencing Options

Juvenile Justice Act 1992 (s.120)

- reprimand
- good behaviour bond (up to 1 year)
- fine
- probation order – 6 months (if before judge up to 1 year)
- community service orders
  13 – 14 years – 20 – 60 hours
  15 – 16 years – 20 – 120 hours
- detention order – immediate release
- detention order – 6 months
  or if judge – 2 years
  or if judge and serious offence – half of maximum adult term or maximum 7 years
  or life offence – 10 years
  heinous violent offence – 14 years

Children's Services Act 1965 (s.62(1))

- admonish and discharge
- convict and fine
- supervision order up to 2 years
- community service orders (passed 1989, but never proclaimed)
- care and control order – recommendation for release by magistrate
- Care and control up to 2 years – recommendation custody from magistrate
- Queen's pleasure – for offences punishable by life imprisonment

Both Acts allow for restitution to be ordered against the child, or in certain circumstances the parent

There are many similarities in the options under both Acts. The major difference is that the Department is to receive resources to develop its community-based corrections program. This is long overdue. Unfortunately, in promoting the notion that the new legislation creates many new options, the Government has created a public expectation of a tougher regime for young offenders, and of course for their families by providing that restitution may be ordered against the child's parents. This provides the potential of criminalising not only the child, but the whole family. (DFSAIA's own information sheets are stating 'that offenders will be punished'.[14] It is very difficult to satisfy the punishment lobby, but the legislation creates an expectation for such satisfaction. It fails to articulate an alternative vision, or a framework for non-punitive inclusionary responses to crime which directly address the experience of victims.[15]

The Act seeks to establish a series of punishments in the community. It enables children who break the conditions of their community-based order to be breached, and potentially resentenced for the original offence. It is noteworthy that the Act, though providing a general obligation on the Chief Executive to provide programs (s.202), ensures that entry to community-based orders is dependent on a representative of the Department reporting that the child is 'suitable' for the program and the program is available (s.146). While the Act was supposed to reduce the discretion of the Department, the content of the programs (i.e. the punishment) is to be specified by the Department. (This, in part, explains the gap between the rhetoric of expanded sentencing options and the limited options provided in the Act.)

The Act embraces the bifurcatory tendencies of much current criminal justice practice: that is most offenders may be punished within the community, but there is a small hard core of offenders whose behaviour is either so uncontrolled or so unamenable to community corrections, that they must be institutionalised.[16] The desert-based sentencing, inherent in the justice model, blinds itself to the processes by which particular events are classified as crimes, and crimes of serious concern, and particular groups and categories of people are processed by the criminal justice system. If the definition of 'serious crime' were restricted to serious crimes of personal violence, then young people would rarely feature as a serious crime problem. But the property crimes committed by young people are constructed as a serious crime problem, demanding a response. Juveniles primarily appear before courts on property crimes and some young offenders repeatedly appear.[17] In relation to young offenders, it is the repeat offenders who are consensually defined as problematic. In terms of the *Juvenile Justice Act* it is these young people for 'whom no other sentence is appropriate' than detention.

In focusing on the offence in sentencing the justice model blinds itself to the discretion exercised by police on where and on whom to focus their attention, on whom to charge and with what. It ignores factors of over-policing, police/youth conflict and racism.[18]

Under the existing legislation similar bifurcatory processes have operated. Queensland has had relatively low rates of incarceration of juveniles — a positive side effect of years of neglect of the juvenile justice system.[19] Yet Aboriginal and Torres Strait Islander young people have faired poorly in the existing sentencing practices of the court.

Aboriginal and Torres Strait Islander children are dramatically overrepresented at the most coercive end of the juvenile justice system. At 30 May 1992, 42.4% of all juveniles in care and control were Aboriginal and Torres Strait Islander children. (Aboriginal and Torres Strait Islander children constitute less than 4% of children aged 10-16 in Queensland.) Of children under a supervision order, 21.5% were Aboriginal or Torres Strait Islander. The disproportionate concentration of Aboriginal and Torres Strait Islander children under the most coercive orders is evident from the fact that as of 31 May 1992, 59.2% of all Aboriginal and Torres Strait Islander children on corrective orders were under care and control and 41.8% on supervision; for non Aboriginal and Torres Strait Islander children the pattern was reversed, 35.1% under care and control and 64.9% under supervision (see *Table 2*).

The most recent indicators of the extent of detention of Aboriginal and Torres Strait Islander children in Queensland are similarly concerning: 42.6% of discharges from detention centres were of Aboriginal and Torres Strait Islander children. The extent of overrepresentation appeared to increase inversely to age: Aboriginal and Torres Strait Islander children constituted 68.8% of discharges of children 10-12 years; 55.6%

13-14 years; 41.7% 15-16 years; and 28.2% 17 years and older (see *Table 3*). The overrepresentation of Aboriginal and Torres Strait Islander children in the Queensland system must remain an issue of major concern.

TABLE 2

Percentage of children under corrective order at 30 June 1992 – Queensland

Car and control	(n)	(%)
ATSI*	218	42.4%
Non-ATSI	296	57.6%
Supervision		
ATSI	150	21.5%
Non-ATSI	547	78.5%

Car and control as % of all corrective orders	(n)	(%)
ATSI	368	59.2%
Non-ATSI	843	35.1%

Source: Department of Family Services and Aboriginal and Islander Affairs

*ATSI: Aboriginal and Torres Strait Islander

There is little in the *Juvenile Justice Act* to indicate that the extent of disadvantage experienced within the juvenile justice system will not be exacerbated by the model underpinning the legislation. The Act does provide for cautioning by Aboriginal elders, and suggests that the court may take into account cultural (among a whole range of other) factors in sentencing. However, these are limited initiatives which do not fundamentally impact on the logic or approach of the Act.

TABLE 3

ATSI children as percentage of all children released from detention in Queensland in 11 months to 31 May 1992 by age

Ag	Total children discharged	% ATSI
10-12	16	68.8%
13-14	126	55.6%
15-16	501	41.7%
17+	110	28.2%

Source: Department of Family Services and Aboriginal Affairs

The opportunities to restructure juvenile justice law, policy and practice are rare. Unfortunately in this case, the legislators and those who advised them opted for a dated vision. It neither takes account of the more recent theoretical innovations in juvenile crime causation[20] or alternative legislative models such as is offered by New Zealand and European countries. Nor does it satisfy criteria from within its own frame of reference that the rights of the young people should be adequately safeguarded. The actualities of practice, and the documented breaches of children rights, have been swept aside in the belief, that if we get the legal formula correct, justice will follow.

Contradictory visions

Contemporaneously with the enactment of the *Juvenile Justice Act* and *Children's Court Act*, the Government announced a 'Juvenile Crime Prevention Initiative'. The Minister stated that the initiative was a part of the Government's social justice strategy. The program recognises the structural causes of crime, and the importance of developing locally-based responses which address such causes. The crime prevention initiative draws on the experience of other 'whole of government' social-problem-oriented crime prevention strategies. The success of such programs has depended on the extent to which the orientation is shared and reflected by all actors in the juvenile justice system — the police, the courts, the community corrections agencies. That is, the extent to which all players perceive the importance of responding to the structural underpinning of crime.

Unfortunately, the social problems orientation to crime prevention is limited to primary prevention, and explicitly limited to non-offending children. It is not embedded in the *Juvenile Justice Act*. The legislation commits neither the police or departmental officers, to act in a manner which accounts for the structural causes of crime. It is most likely that the legislation will be publicly seen as the major response to juvenile crime. The legislation does not educate the public, rather it creates an expectation for tough treatment of juveniles — an expectation it will find hard to satisfy. (It is worth noting that the legislation was passed three weeks before an election in which law and order was a major issue, with little dissent by the opposition parties).[21] It is a major concern that the crime prevention initiatives may be submerged by the dominant orientation of the legislation. The ethos of the Act will permeate the community correction programs. The logic of the Act means that within community corrections, the primary concern will be risk management and order compliance, rather than the issues of the disadvantaged, experienced by the young offender. Minimal resources are currently provided for the welfare and support needs of young offenders.[22] There is nothing to suggest this will change.

In the budget presented to Parliament prior to the election, the Government announced a significant injection of resources to finance the crime prevention initiative and the *Juvenile Justice Act*. This commenced the process of redressing the neglect of juvenile justice issues over the past 10 to 12 years. In this period of neglect, the skills base of the DFSAIA and indeed the community sector in the area of working with young offenders has been eroded. It is of considerable importance that this skills deficit is addressed in a manner, which does not lead to a simplistic and rigid implementation of the *Juvenile Justice Act* across the State. Workers will require education, not just about the Act, but about the nature and extent of juvenile crime and appropriate responses to juvenile crime. The legislation will be implemented in the context of minimal, non-statutory social resources for disadvantaged young people. The Act must not be an excuse for the non-provision of welfare services to youth who have offended.

References

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A communicative model of sexuality emphasises the importance of mutuality of desire and is far better suited to women's experience of sexual pleasure than the penetrative/coercive model. It also provides a framework for the legal system to appreciate that 'passive acquiescence' and 'physical inactivity' is not enough to establish consent to sexual penetration.

Conclusion

Sally Brown, the Chief Magistrate of Victoria, has been quoted as saying: 'Legislation alone doesn't change culture, but it can be a powerful tool'.[15] Section 37(a) is a 'powerful tool' in that it provides an opportunity to reassess the assumptions pertaining to 'normal' sexuality.

The educative role of rape reform legislation is always significant in that it means an immediate change in the behaviour or practice of those involved in the legal system. The inclusion of s.37 in the *Crimes Act* means that judges have no choice except to comply with the mandatory requirement to give jury directions in 'a relevant case' whether or not there is individual agreement with the policy objectives of the reform.

Changing the presumption of consent means that there must also be an immediate change in trial practice and procedure. This will hopefully have a flow-on effect in that other professionals, notably the police and hospital personnel will become aware of the effect of s.37 in changing the law as to consent.

Other Australian jurisdictions may benefit from examining the reforms to the Victorian law of rape, but it must be remembered that rape laws exist in a social context and case law inevitably reflects cultural norms and values. Section 37(a) has changed the presumption of consent in the legal context. It now remains to be seen whether or not it can also inspire a reassessment of social attitudes towards sexuality.

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6. *R v Olugboja* [1981] 3 All ER 443, p.448; *R v Maes* [1975] VR 541, p.548.
7. ACT *Crimes Act* 1900 (NSW) in its application to the ACT, s.92P(2); NSW *Crimes Act* 1900, s.61R(2)(d); SA *Criminal Law Consolidation Act* 1935, s.48; WA *Criminal Code* 1913, s.324G and Victoria *Crimes Act* 1958, s.37(b)(i).
8. *R v Howard* [1965] All ER 684 at 685; *R v Chadderton* (1908) 1 Cr App Rep 229; *R v Harding* (1938) 26 Cr App Rep 127; *R v Lang* (1975) 62 Crim App Rep 50; *R v David Ram Singh* No. 226 of 1990, 18 December 1990, Vic CCA, pp.7-8.
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10. The Law Reform Commission of Victoria, Report No. 43, *Rape: Reform of Law and Procedure*, 1991, p.8.
11. The Law Reform Commission of Victoria, as above, p.16.
12. The Law Reform Commission of Victoria, Appendixes to Interim Report No. 42, *Rape: Reform of Law and Procedure*, 1991, p.86.
13. Pineau, L., 'Date Rape: A Feminist Analysis', (1989) 8 *Law and Philosophy*, pp.217-243, p.232.
14. Pinneau, as above, p.241.
15. The Law Reform Commission of Victoria, Appendixes to Interim Report No. 42, 1991, p.170.

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3. Murray, J.M., 'The Development of Contemporary Justice and Correctional Policy' in A. Borrowski and J.M. Murray (eds), *Juvenile Delinquency in Australia*, Methuen, Sydney, 1985; Schneider, A.L., *Deterrence and Juvenile Crime: Results from a National Police Experiment*, Sage, 1990.
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9. See for most recent research and summary of the literature Alder, C., O'Connor, I., Warner, K. and White, R., *Perceptions of the Treatment of Juveniles in the Legal System*, National Clearinghouse for Youth Studies, Tasmania, 1992.
10. See for example Alder, and others, above; Faine, J., 'Just a Phone Call: Privilege or Right' in I. Freckelton and H. Selby (eds), *Police in our Society*, Butterworths, Sydney, 1988; Federation of Community Legal Centres (Vic.), *Report into the Mistreatment of Young People by Police*, June 1991; Human Rights and Equal Opportunity Commission, *Our Homeless Children*, AGPS, Canberra, 1989, at Chapter 21; MacMillan, A., 'A National Approach to Juvenile Justice', paper presented to the Australian Institute of Criminology, National Conference on Juvenile Justice, Adelaide, 22-24 September 1992; O'Connor, I. and Sweetapple, P., *Children in Justice*, Longman Cheshire, Melbourne, 1988; Youth Justice Coalition, *Kids in Justice*, Youth Justice Coalition, Sydney, 1990.
11. O'Connor, 1992 above; and on the overstatement of the impact of the welfare model in the Children's Court in Australia, see Seymour, J., *Dealing with Young Offenders*, Law Book Co., Sydney, 1988.
12. Naffine, Wundersitz and Gale, above, p.204.
13. The importance of symbolism of the sentencing options was evident in the Labor Party's response to the Liberal Party's law and order campaign in the 1992 State election campaign. The Labor Party proudly boasted in its commercials that it had introduced legislation that provided for the detention of juveniles for up to 14 years, as well as introducing laws providing for indeterminate sentences for adult offences!
14. The Premier was reported in the *Courier-Mail* (14.11.91) as expecting that the new Act would result in more young people in detention, but for shorter periods!
15. Braithwaite, above.
16. Pitts, J., *Working with Young Offenders*, MacMillan, London, 1990.
17. O'Connor, I., 1992, above.
18. Royal Commission into Aboriginal Deaths in Custody, *Final Report*, AGPS, Canberra, 1991; White, R., *No Space of Their Own: Young People and Social Control in Australia*, Cambridge University Press, Melbourne, 1990.
19. See O'Connor, 1992, above.
20. For example, Braithwaite, above.
21. The Opposition's major objection was that the Act provides for the raising of the age of a juvenile to 18 years at some later date.
22. A significant proportion of young offenders are released from detention centres to youth refuges.